Solicitation and Contract Award Reviews

Agenda

- Introduction
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- CIS v. UCF
- CICA Considerations
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- Pricing Considerations
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Purpose

- **Solicitation and Contract Award Reviews for Service, Supply and Construction Contracts**

PD2 v. Contract File

- A Citrix-forwarded solicitation will not contain enough information to allow you to conduct a meaningful review. Insist upon seeing the hard copy file.
- Sections A&B of the USP&FO Contract Record Index are pertinent to the solicitation and contract award legal review.

USP&FO Contract File

- NGB Form 8 -- Highlights
- A-3 Advanced Acquisition Plan (Required)
- A-7 Liquidated Damages Determination
- A-9 Sole Source Justification
- B-2 Notice of Late Bids/Proposals
- B-4 Verification of Bid/Mistake in Bid
- B-6 Price Negotiation Memorandum
- B-7 Cost & Pricing Data
- B-8 Source Selection Documentation
- B-9 Determination of Responsibility
- B-12 D&F of Adequate Competition May Vary by State

Funding Documentation A-2

- It should contain at a minimum:
- Proper certification of funds, fund type and availability, i.e., ARNG 2060, 2065, 2085 & ANG 3850, 3840, 3830 – MilPay, O&M and MILCON
- The funding document – AF Form 9 or DA Form 3953 – signed by a certifying official

The Contract File

- Description of the supplies or services to be obtained (PR).
- Delivery schedule consistent with the requirement.
- Acquisition Plan (required by FAR Part 7).
- Source Selection Plan (not required but a good idea).

IFB v. RFP

- Invitation for bids (IFB) or Sealed Bidding (FAR Part 14) is appropriate when cost is the only evaluation factor to be considered and the agency has a reasonable expectation that it will receive bids from at least two bidders.
- Well-developed statement of work.
- Not used as frequently as negotiated procurements.

Consistency is not a Hobgoblin

- If the contract is for construction, it will probably be in the Construction Specification Institute (CSI) format of 16 divisions (soon to be 33) organized by trades: steel erection, electrical, etc.
- Supplies and services should follow the Uniform Contract Format (UCF) found in FAR 14.201-1.

Competition in Contracting Act of 1984

- CICA requires the Government obtain “full and open competition” in its procurements.
- FAR Part 6.302 provides the exceptions to “full and open competition.”
- The most common exceptions are only one responsible source exists 10 USC §2304(c)(1) or unusual and compelling urgency (c)(2).

Justification & Approval

- If the Government uses other than “full and open competition,” it must prepare a J&A.
- Threshold for legal review is set by the agency (usually $100,000).
- Prepared by the program manager and approved by JA and the Competition Advocate (the USP&FO).
- Market Research (FAR Part 10)

FAR Part 13 Simplified Acquisition

- Simplified Acquisition Threshold (SAT) for noncommercial items is $100,000 and $200,000 in OCONUS contingency operations.
- SAT for commercial items (FAR Part 13) is $5 million.
- Preference to buy commercially available supplies and services whenever practicable.

Synopsis

- Review the Synopsis (Tab A-10) before it is published on the Federal Business Opportunity Page (FedBizOpps.gov).
- Ensure that the Synopsis is published for the requirement period of time prior to the release of the Solicitation (FAR 5.203 usually a minimum of 15 days).

Negotiated Procurements FAR Part 15

- Requests for Proposals (RFP) allow for exchanges that can take varying forms between the Government and offerors (clarifications, communications, discussions and negotiations).
- The Government may also make award based on initial proposals (FAR 52.215-1(f)(4) – a very important clause!)

Evaluation Factors

- Stated Section M of the Uniform Contract Format and given relative weights: noncost factors, when combined, are: significantly more important than cost, equal to cost or significantly less important than cost. If unstated, they are assumed to be equal.
- Evaluation – voting members must be federal employees, not contractors or state.

Subfactors

- Practice point: Avoid subfactors. Make contemplated subfactors components of the factor: “At a minimum, offeror must demonstrate its financial capability by providing evidence of its revolving line of credit or equivalent NLT $250,000.”

Past Performance

- The 1997 Revision to FAR Part 15 made Past Performance a mandatory evaluation factor unless waived by the Contracting Officer in writing.
- Is it required as an evaluation factor? Does past performance evaluation provide for a neutral rating for lack of past performance?

Variable Quantity Type Contracts

- FAR Part 16 contains guidance for variable quantity type contracts.
- Indefinite Delivery, Indefinite Quantity (IDIQ) Task Order Contracts for construction – common in the States.
- Ensure contract identifies a guaranteed minimum quantity.
- Requirements Contracts – is it really?

Truth in Negotiations Act

- Truth in Negotiations Act (TINA).
- Requirement for Cost or Pricing Data.
- Does TINA apply?
- Analysis:
- Over $550,000, noncommercial (not FAR Part 12) item, sole source, negotiated procurement (FAR Part 15).

More Important Stuff

- Liquidated Damages -- Construction 52.211-12 & their determination memorandum.
- Audit Rights – 52.214-26 & 52.215-2.
- Davis-Bacon Act prevailing wages 52.222-6.

Payment & Performance Bonds

- Miller Act (FAR Part 28) requires both Payment (protection for subcontractors and suppliers) and Performance Bonds (protection for the Government). 52.228-15
- Treasury Department Circular 570 identifies sureties and their bonding limits.
- Review the Bonds using JALS Form 892.

Government Furnished Property

- Government may make available property, equipment or material (GFP, GFE, GFM) to increase competition or small business participation.
- FAR Part 45 provides guidance.
- Danger is that the material will arrive late or be unsuitable for its intended purpose.
- FAR 52.245-2 Government Property Clause allows for profit in delay claims for late GFP.

Price Negotiation Memorandum

- This is the key document stating the rationale for the source selection decision. It will be the focus of any agency or GAO protest. If the Source Selection Authority takes exception to this PNM, it should be well-reasoned.
- If cost & pricing data required, the PNM demonstrates agency reliance on such data.

Source Selection Decision

- JA participation in the Source Selection Evaluation Board (SSEB) recommendation to the Source Selection Authority (SSA).
- JA review of the SSA's Source Selection Decision Document.
- Ensure that the evaluation factors were applied consistently and IAW the solicitation's instructions.

Contract Award Pricing Considerations

- Price Analysis: The Government determines that the offered price is both fair and reasonable.
- Contracting Officer must make this determination in writing.
- Cost Reasonableness ensures awardee understands the contract requirements. Differs between cost and fixed-price type contracts.

Affirmative Determination of Responsibility

- Current capability to perform and integrity – check GSA's Excluded Parties List System www.epls.gov for suspended or debarred contractors.
- Contracting Officer makes a written determination of responsibility.

Conclusion

Continue to use the 30 August 1999 Contract Review Checklist as a point of departure in performing solicitation and contract award reviews. Be attuned to the areas touched upon in this information brief and don't hesitate to contact MAJ Tim Ryan at NGB-JA for guidance.

Questions?

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